Joseph Schumpeter’s seminal model of entrepreneurship described entrepreneurial opportunities arising from a gale of creative destruction that irretrievably breaks the existing situation, allowing the new to emerge. He called this process ‘bahnbrechen’ and regarded it as the seed of entrepreneurship (Schumpeter [1912], 1933, 1939, [1942] 1967).

INTRODUCTION

One highly influential element within this gale of creative destruction is regulation which may deliberately seek to alter the economic structure or may have that effect. This paper considers possible ways to better understand the impact of regulatory change upon the gale, the bahnbrechen process and entrepreneurial outcome.

It uses Australian native title legislation as the relevant regulatory change. This profound legal change altered Australian property rights so as to “destroy” the unencumbered status of Crown land and, over that land, “create” native title rights in favour of traditional Aboriginal People. It also “created” entirely new national organisational and tribunal structures as well as systems for processing native title claims. As Crown land is managed by Federal, State and Territory Governments, it also changed existing Government organisations and “created” new organisational relationships between Aboriginal organisations and Governments.

Analysis of a legal change of this kind needs to draw not only from existing literature articulating Schumpeter’s model and linking entrepreneurship and regulatory change, but must also broadly consider Government entrepreneurship, social capital and trust, power and voice.

Within such a highly complex setting, the purpose of this paper is to provide a preliminary exploration. It focuses on those persons for whom, according to the legislation, benefit is “created” – in this case Aboriginal peoples. It describes the experience of two diverse Aboriginal peoples and, from this, identifies a variety of theoretical possibilities and further research directions.

Schumpeter

Schumpeter viewed economic development as a “kind of change arising from within the system which so displaces its equilibrium point that the new one cannot be reached from the old one by infinitesimal steps” (Schumpeter 1934, fn1, 64).

(It is a) “process of industrial mutation … that incessantly revolutionizes the economic structure from within, incessantly destroying the old one, incessantly creating a new one. This process of Creative Destruction is the essential fact about capitalism. ... Every piece of business strategy acquires its true significance … against the background of (an organic process) and within the situation created by it. It must be seen in its role in the perennial gale of creative destruction; it cannot be understood irrespective of it or… on the hypothesis that there is a perennial lull” (Schumpeter 1942, 83-4).

Schumpeter described organisations attempting:

“to deal with a situation that is sure to change presently… to keep on their feet, on ground that is slipping away from under them” (Schumpeter 1942, 84).

The relevant problem, he said was, is how capitalism creates and destroys existing structures, a process that not only never is, but never can be, stationary due to its changing social and natural environment.
He considered that the fundamental impulse setting and keeping the capitalist engine in motion comes from new goods, methods, markets and organizations (Schumpeter 1934, 66).

**Entrepreneurship and Regulatory Change**

Drucker (1985), Venkataraman (1997), Shane & Venkataraman (2000) and Eckhardt & Shane (2003) identified a need to explore the effect of legal change on entrepreneurship. Legislative or regulatory change is a key societal mechanism of sufficient significance to potentially effect or direct the “gale” itself and/or the motion of individual organisations within it, including influencing the ease within which one organisation rather than another may create new goods, methods, markets or organisations.

Drucker (1985) described 3 categories of market opportunities one of which was “reaction to shifts in the relative costs and benefits of alternative uses for resources as occurs with political (or) regulatory … changes”.

Baumol (1990) concluded that the ‘rules of the game’ determined the allocation of entrepreneurial activity between productive, unproductive or destructive activity. He considered that Schumpeter’s model required modification to account for this.

Venkataraman and Shane (2000) considered that “(t)echnological, political, social, regulatory and other types of change offer a continuous supply of new information about different ways to use resources to enhance wealth” (Shane & Venkataraman 2000, 221) and also influence the relative distribution of productive and unproductive opportunities across locations (Venkataraman 1997).

Eckhardt & Shane (2003) observed that regulatory intervention alters the structure of industries thereby creating opportunities for new entrants. For example, anti-trust laws and deregulation created opportunities such as telecommunications, natural gas (Winston 1998), banking, airlines, trucking, railroads and electric power industry (Sine et al 2001) and created markets (Gioia 1989) through establishing purchasing guidelines for alternative power producers (Sine et al, 2001) and regulated returns on capital (Farris & Sampson 1973).

This literature suggests an important role for legislative intervention in creating entrepreneurial opportunity including focusing productive activity, shifting costs and benefits, re-structuring industries and directing information.

**Societal Aspects**

However, Aboriginal Australians are “as a group, the most disadvantaged in Australian society” (Native Title Act 1993, Preamble). Fukuyama (1995) considered that the form of social capital constrained the way entrepreneurship develops. Social capital and trust literature identified that an essential pre-condition for vigorous entrepreneurial capitalism was shared values underpinning co-operation, embedded habits of trust and co-operation (Fukuyama 1995, Gambetta 1988, Putnam 1993a, 1993b) or infrastructure detecting and sanctioning untrustworthy behaviour (Legge & Hindle 2004). According to this thinking, any entrepreneurial outcome arising from transformative legal change within the gale of creative destruction is inextricably entwined with underlying social values. Indeed, within a democracy, legislation itself is a reflection of a dialogue within a social context (Macdonald & McMorrow, 2007, Brooks et al 2003).

An important influence shaping legislative or regulatory change within a democracy is those whose voice is heard and those who are listened to. It is these voices that influence and shape legislation (Foucault 1982). Voice is core to interface with the western legal system. It is the way evidence occurs and individual rights are articulated. Those whose self-believed stories are officially transformed into fact by the legal system contrast with those whose stories, still sincerely believed by themselves to be true, are officially distrusted or not heard. Those not believed live in a legally sanctioned ‘reality’ that clashes with their perceptions (Schepppele 1989). Such a clash of perceptions could influence both perception of entrepreneurial opportunity as well as entrepreneurial outcome.

Empowerment also appears to be a feature of entrepreneurial outcome regardless of legislative change. In Foley’s study of Australian Aboriginal entrepreneurs, a powerless social setting was identified as a key risk factor, as well as a driving motivator (Foley 2000). Larsen (1992) studied international alliances, finding that successful organisations exploit power imbalance to gain strength. There is also a sense of this at play in studies linking entrepreneurship and geographical location – Italian patenting
ratios improving according to locational synergies (Capello 2002), successful Cuban immigrant entrepreneurs operated within a closely located Miami enclave (Peterson & Roquebert 1993), Swedish village start up SMEs more readily sourced local finance (Winborg & Landstrom 2000) and UK female entrepreneurs chose local opportunities (Brindley 2005).

Complex social forces, including voice, trust, social capital and power, not only determine the form of any legislative change, but also directly and indirectly influence its practical operation. Operating alongside legislative intervention, including triggering it and intertwined with it, they may also play an important role, in focusing productive activity, shifting costs and benefits, re-structuring industries and directing information. Schumpeter’s model may assume some or all of these elements within the gale but greater understanding of the operation of the “gale” requires examination of influences within it. For example, it may be that Schumpeter’s model only applies when certain pre-conditions of voice, trust, social capital or power operate at all or within certain combinations.

**Government Entrepreneurship**

Given the above, the powerful role of Government requires particular consideration. It has numerous roles, both discrete and interrelating. From its three constitutional arms – Judiciary, Legislature and Executive – it is not only legislator, but also, for example, policy maker, economy manager, taxer, enforcer, landowner and land manager as well as, in some instances, developer and entrepreneur. Very frequently, analysis of Government functions mixes these roles (for example, Productivity Commission 2005).

The entrepreneurship literature identified a “philosophical duel” between what might be called the ‘pro-entrepreneurship-in-Government movement’ and the “administrative conservatorship” approach. Kalu (2003) explored the role of the individual bureaucrat as both citizen and Government agent in shaping accountability. He was deeply suspicious of both entrepreneurial and bureaucratic integrity preferring the administrative conservatorship role. By contrast, Peled (2001) was optimistic about possibilities for entrepreneurship-in-Government. He considered that innovation required powerful stakeholders built into the innovation process. Rather than distrusting motives, he emphasised a trust-building model, with requirements for speedy, flexible and excellent communication among identified and powerful stakeholders. Others observed a concept of public sector ‘agility’ and the need for flexibility (Vincent 1996, referring to Abad & Palacio 1994, Bjorkman & Sundgren 2005).

Thus, where Government itself seeks to act entrepreneurially, it may be severely constrained by duties of public trust and limitations on organizational flexibility, agility or communication. In examining entrepreneurial outcomes from legislative change, these limitations as well as Government’s powerful non-legislative roles may be key influences upon any entrepreneurial outcome.

**Native Title legislation**

Australian Native Title legislation was enacted by the Parliament of the Commonwealth of Australia following judicial recognition of native title in 1992 by the High Court of Australia in the leading case of Mabo & ors v The State of Queensland (1992) 175 CLR 1. The legislative process that followed this High Court decision was complex, highly political and the subject of vigorous public debate. The Native Title Act 1998 (Cwth), “the Act”, commenced on 1 January 1993. Its Preamble stated that:

- “The Aboriginal people) have been progressively dispossessed of their land. This dispossesion occurred largely without compensation and successive governments have failed to reach a lasting and equitable agreement with (them) concerning the use of their lands.”
- “The people of Australia intend:
  a) to rectify the consequences of past injustices by the special measures (in the Act) … for securing the adequate advancement and protection of Aboriginal peoples …; and
  b) to ensure that Aboriginal peoples … receive the full recognition and status … to which … their prior rights and interests … fully entitle them to aspire.”
- Governments should … facilitate negotiation … in relation to … proposals for the use of (Aboriginal peoples) land for economic purposes.

This legislative intent appears clearly designed to assist Aboriginal peoples despite other statements in the Preamble that “the needs of the broader Australian community require certainty”

The bundle that is native title rights may amount to:
• Exclusive possession, the right to possess, occupy, use and enjoy the area including the right to control access to and use of that area; or
• More limited rights and interests in the area which may include, as specified, the right to:
  o Access;
  o Live or camp;
  o Visit and protect important places;
  o Hunt, fish and gather food and bush medicines;
  o Take water, wood, stone, ochre and other traditional resources;
  o Conduct social, religious and cultural activities such as ceremonies and meetings;
  o Teach law and custom.

There are no native title rights to mineral, petroleum or gas and no exclusive rights in tidal, sea areas and flowing or subterranean water (Commonwealth of Australia 2006 (a), 7).

Native title is not granted by Government. It is recognized by a judicial determination of the Australian Federal Court arising from a claim made and processed through the system created by the Act. The process proscribed by the legislation is extremely complex. A successful claimant must establish prove that laws and customs observed today have roots in the traditional laws and customs of their ancestors and have been observed “substantially uninterrupted” since Britain exercised sovereignty over their land (Commonwealth of Australia 2006 (a), 6).

The National Native Title Tribunal (NNTT), created by the 1993 Act, is an independent body to assist people to resolve native title issues. The Registrar assists the NNTT President in managing its administrative affairs.

Native title legislation is a transformative legal change because it:

1. allowed for “creation” of new and overriding rights, including property rights;
2. allowed for “destruction” of an existing, unencumbered property right;
3. provided for co-existing rights over the same land. Unlike other co-existing property rights, e.g. leases, licences or covenants, co-existence may be externally imposed by the Court, without agreement, and does not relate to land infrastructure or development;
4. created on-going property alliances of necessity in respect to land;
5. destroyed the Crown’s monopoly position in its land;
6. created new, and changed existing, Government organisations;
7. created a new type of property market relationship; and
8. altered the Australian property market.

Legislative Features
Key features of native title legislation are that the first steps in “destruction” of unencumbered Crown property rights and “creation” of native title rights were taken by the judicial arm of Government, the High Court of Australia. Subsequently, the Australian Legislature (Australian Parliament) enacted, and various Commonwealth, State and Territory Executives established and operated, mechanisms managing this recognition.

High levels of distrust exist between the entities for whom rights were created (“creation” entity) i.e. Aboriginal people and the entity who suffered destruction of rights (“destruction” entity) i.e. Crown/Government. The “destruction” entity as landowner was the same entity which, as Legislature, and later as Executive, became responsible for the legislation that managed the “destruction” process. The “destruction” entity was extremely powerful. The “creation” entity was extremely disadvantaged. “Creation” of the new rights frequently affected land with significant economic and development potential, for example the locations of major mining or pastoral businesses or within cities. Government’s additional roles as economic manager, industry incentivator, capital city developer, taxer, grant giver and enforcer must not be overlooked as potentially being strongly influential upon any, and if so the form of, entrepreneurial outcome.

Native Title Outcomes
In considering shifting costs and benefits and focusing productive activity, a 2006 meeting of relevant Federal, State and Territory Ministers considered that native title processes assist to identify:
• “measures that contribute to economic development for Indigenous Australians”;
• “opportunities for capacity-building and other support for Indigenous communities”; and
• “assistance to secure long term and lasting benefits for Indigenous communities from land” (Commonwealth of Australia, 2007, 10).

Nevertheless, the most recent NNTT Annual Report stated that “determinations often deliver few benefits to Indigenous Australians” (Commonwealth of Australia, 2007, 9). The high costs of participation in the system have also been identified by the NNTT and the former Attorney-General as a problem causing frustration to its clients and stakeholders (Commonwealth of Australia, 2007, 6; Commonwealth of Australia, 2006 (b), 9). NNTT reports confirm delays in claim resolution, noting that at current rates, “many older Indigenous Australians will not see their claims finalized” (Commonwealth of Australia, 2006 (b), 9).

Case Study
This case study sought to make a preliminary exploration of the entrepreneurial outcome of native title legislation, from the perspective of the persons identified in its Preamble as those intended to receive advancement and facilitation of their economic land use.

Empirical data was gathered by interviews with native title claimants from two Aboriginal people. The studies were chosen to reflect different types of land impacted by different types of pre-existing economic activity, as well as culturally and geographically different Aboriginal peoples, both remote and highly urbanised.

The first native title claimant interviewed (A) was the Elder of an Aboriginal community whose traditional land is a very large expanse of country located in remote Central Australia. It is largely desert country, much of which is magnificently scenic and in pristine environmental condition, but impacted by extremely harsh climatic conditions. Some of Australia’s largest mining organisations operate on or adjacent to this country as do large pastoral interests. The Elder is a sole claimant for his People, which lodged the first native title claim in Australia. He received his mandate from traditional Old People at a meeting of all relevant Peoples convened 15 years ago.

The second native title claimant (B) was concerned with land situated in the heart of an Australian Capital City. This country is located within a highly urbanized setting, where large parcels have been alienated from the Crown and much of the landscape has been irretrievably altered from its natural condition. Any undeveloped parcels of land in this location are valuable and highly sought after for urban development. Natural places, including those of Aboriginal significance, continually experience intense pressure for urban building and works. B is one of his People’s senior men (B) and, following intense internal dispute within and among organizations comprising those People, lodged a claim for that land. He provided email comment (BE) and was also interviewed (BI).

Experience with native title
Both respondents reported negative experience with native title, including community division and distress.

“It’s just a river of pain, a river of frustration and a river of hopelessness.” BI.

“My experience with native title is that it gives us nothing, nothing.” “It actually takes away your rights and the rights that you had previously”. “It creates divisions within families. Mothers fighting daughters. Daughters fighting mothers. Fathers and sons. Families.” A

“(T)here is a number of deaths in the community because of the strain it places on the old people and reliving their lives, telling their history again and the anthropologists that work on behalf of the Government basically are there to prove that you are a liar.” (Sic) BI.

Economic Benefit
Both respondents reported absence of economic benefit or entrepreneurial outcome.
“I don’t think there has been.” “I’d like to see if someone can tell me where there has been an economic gain or benefit as a result of native title anywhere in Australia.” A

“Native title as the current laws stand is a waste of time and a huge waste of taxpayers’ money in the way the full weight of the law (and government resources) is thrown against each and every Indigenous claimant.” BI

Native title as security for new venture funding
Native title, unlike full title to land, was insufficient to provide security for new venture start up by either individuals or claimant communities.

“There’s nothing there for you to take (to a bank). It’s just an acknowledgement that you have native title rights.” A

“I’m sure, I’m very sure that there wouldn’t be a funding organisation that would take that on. It’s too large a group. … It wouldn’t happen. I’m not saying you couldn’t have it, I’m saying you wouldn’t have it. You’re dealing with too large a group.” A

Even where native title negotiations resulted in cash or royalty payments, serious impediments to new venture starts existed.

“You have got to control that money for the betterment of your people and the wellbeing of your people. Got to put in place structures, strategies, manage for the best outcome. That’s not happening. I know. Getting millions of dollars of royalties from the mining companies. By the time they distribute it out to all the members they’re getting $175. Is that a benefit?…You’ve got to have training and skills, you’ve got to look to long-term foundations. You’ve got to train all these people. So they’ve got all this money – can’t handle it. You’ve got to make sure of your long term future.” A

Trust
Both respondents articulated deep distrust of Government.


B referred to legal concepts of trust:

“It is the trust aspect … the Crown has a duty of care which it is not providing.” BI

Voice
Both respondents considered that Aboriginal people had no effective voice.

“They don’t. They don’t have a voice. They didn’t have a voice. This is another culture imposing its cultural practice, cultural legislation or its laws and customs. You wouldn’t expect it. You wouldn’t expect it.” A

“The Judges refuse to deal with the individual cases …, supporting precedents exclusionary to Indigenous rights, …unless we are naked savages eating lizards and scratching an existence from the dirt without access to medicare or modern social services.” BE

Legislative Outcome
In describing the outcome of the native title regulatory system, both respondents expressed serious concerns and both provided an example of action that directly created harm.

“The mining company set up a competing native title claim. Money was paid from the mining company office in Darwin, deposited in the account in Alice Springs and drawn out of Alice Springs by this group. The CIB tracked that.” A
“The State … allowed (a competing claimant) to take our lands, destroy the significance by allowing bike riders to damage engravings, then obtain a Development Approval as there is allegedly no longer Aboriginal significance and then on sell it. … (Our People were) not consulted.” BI

**Government Roles**

It was clear from both respondents that Government involvement merged roles and represented a significant power imbalance.

“The State … allowed activity that damaged Indigenous significance. It then granted development approval. … Then they sold it. At the same time, it had trust responsibilities and a duty of care under the … Land Rights Act.” BI

“There’s so much wrongdoing by the native title by the Government against (our) People” A

**Opportunity**

When asked whether any benefits or opportunities arose from native title:

“I would say, I would say – no.” A

“No, not one…” BI

**DISCUSSION**

Australian native title legislation appears to frustrate outcomes, including entrepreneurial outcomes, for Aboriginal people. This operates across regional and geographical differences. Extreme distrust and power imbalance, silencing and flawed interaction with Government are reported as key constraints. Although a creative destruction of unencumbered Crown property rights occurred, this regulatory regime appears, in practice, to operate negatively as a deeper destructive force, with anger, distrust and disempowerment negative “creative” outcomes. It may even be that, despite the aspirations of the High Court Justices and the legislative statement of intent, negative elements of ‘social capital’ or other powerful forces operate so that entrepreneurial opportunity is actually arising for ‘Western’ interests, for example pastoral, development or mining, rather than Aboriginal people. Limited social capital exists in the context of native title legislation with respondents reporting reduced trust and co-operation. This supports Fukuyama’s view that the form of social capital constrains the way in which entrepreneurship develops.

The very complex organizational and administrative processes established by the native title system may be key influences impacting outcome. In this case, Government is exercising a mixed variety of its powers and swinging from legislator to owner to developer to economic stimulator or development approvals authority. Within a Federation, various levels of Government are involved. Because native title legislation responded to judicial decision, it may be that legislative or executive arms of Government activate other Government powers more than if the legislation had “seeded” without judicial push.

Alternatively, it may be the process itself that is creating difficulties or it may be due to corporate, Indigenous or community perceptions of that process. This could be related to Government’s own limitations in entrepreneurial endeavour and its limited ability to operate with agility. Organisational change within Government may have been inadequate to respond to the dramatic gale of creative destruction created by the transformative legislative regime. However, in contrast to conventional private property ownership rights, which largely leave owners autonomous of involvement with Government or other property interests, native title rights necessarily force Aboriginal people into connection with bureaucratic processes and external interests.

Voice and silencing emerge as key issues in the operation of this legislative change. Dialogue with external anthropologists, bureaucracy and judicial bodies is reported as being flawed. Aboriginal voice is not, or is not perceived by Aboriginal People as, being heard or listened to. NNTT documentation confirms that many older Indigenous people may actually die before being heard.

In the light of the above, Schumpeter’s model may require refinement to better account, within the gale of creative destruction, for voice, trust, social capital and the influence of power. It was Baumol’s view that Schumpeter’s model required modification to account for the influence of the “rules of the
game” upon productive outcomes. However, it may be that profound social influences of the kind described above operate behind, beside or entwined within those “rules” as the true forces influencing outcomes from the highly complex “gale” – rather than the “rules” per se. Alternatively, it may simply be that the “rules of the game” are only one of many significant forces within a very complex ‘gale’ which at present is only imperfectly understood.

The case study also suggests that, whilst entrepreneurial outcome may be the result of legislative change, the form and location of that outcome may not reflect legislative intent but spin out in another direction(s) determined by other factors. As Drucker, Shane and Venkataraman postulated, legislation does appear to shift relative costs and benefits, but in practice native title legislation operates so as to disadvantage the Aboriginal people which the legislation states it intends to benefit. Further, as Venkataraman predicted, the legislation generated massive new flows of information, including knowledge of Aboriginal cultural connection to country. However, that information appears to have been extracted from Aboriginal people (at personal cost to them) but used as a resource to assist and improve the security of more advantaged interests, for example mining or pastoral organisations.

Alternatively, rather than any of the above theoretical possibilities, it could simply be that the gap between legislative intent and outcome arises from operational or organizational flaws either generally or specific to the native title context. Organisational change processes flowing from this very complex legislative change, rather than the legislation itself, may be constraining entrepreneurial outcome. Conversely, absence of entrepreneurial outcome may be due to legal flaws in conceptuallyizing or drafting the system so as to properly reflect what the Preamble states to be its intent. In other words, hidden within the fine print of the legislation, deliberately or carelessly, may be provisions operating to override that intent. Alternatively, legislative intent may not be drafted with sufficient clarity; or it may be that the complexity of the statute contributed to failure to achieve its stated intention. Were this so, regulatory clarification and simplification might facilitate positive Indigenous outcome.

CONCLUSION

This preliminary exploration of the entrepreneurship literature, within a case study arising from transformative Australian native title legislation, confirms an important role for legislative intervention in shifting costs and benefits and directing information. However, across regional and geographical locations, complex social and organisational forces, influenced by voice, trust, social capital and power, appear to not only determine the form of legislative change but also its practical operation. Operating alongside legislative intervention, including triggering it and intertwined with it, these complex forces appear to play an important role in the nature and form of focus, shift, re-structure and information direction and, in that way, influence consequent entrepreneurial outcome. Schumpeter’s model may assume some or all of these elements or it may only apply when certain pre-conditions of voice, social capital, trust and power are operating at all or in certain ways or combinations. Entrepreneurial outcome may spin out away from statements of legislative intent. Organisational change processes flowing from transformative legal change may constrain the change outcome as also may legislative drafting.

Much more knowledge of the forces within the “gale of creative destruction” is needed before accurate, or indeed any, prediction of entrepreneurial outcome following legal change is possible. Further research is needed in a number of different directions and across disciplines in order to explore these numerous possibilities. However, given the extent of regulation within contemporary Western economies and frequent reliance by Governments and industry upon regulatory interventions to stimulate entrepreneurship and economic prosperity, such research is important and urgent.

Finally, for Aboriginal Australians, the existing legislative system fails them in regard to entrepreneurial outcome. Immediate attention is needed to understand the extent to which future legislative change would enable achievement of more positive entrepreneurial outcomes for them.

NOTES

1. The 1993 legislation was substantially amended in 1998 and again in 2007. None of the provisions extracted in this paper were altered after 1993.


Commonwealth of Australia, 2006, (a) *About Native Title*, National Native Title Tribunal.


